United States Court of Appeals

for the Second Circuit



APPELLANT'S REPLY BRIEF

75-7213

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7213

15 Pls

LUIS FUENTES,

Plaintiff-Appellant

-against-

ADOLPH ROHER, RICHARD LEE PRICE, JEROME GOODMAN, SAUL MILDWORN, DONALD S. BROWN, LYLE BROWN, MARTIN RUBIN,

Defendants-Appellees

AND

CAROLYN KOZLOWSKY, GEORGINA HOGGARD, HENRY RAMOS, CARMEN BARRETO, JANICE WONG,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of New York

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SECOND CIRCUIT

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PRELIMINARY STATEMENT

Plaintiff-appellant ("plaintiff"), submits this brief in reply to the brief of defendants-appellees ("defendants"). In addition to clarifying certain factual allegations raised in defendants' brief, and responding to certain of defendants' points of law, plaintiff wishes to invite this Court's attention to the recent case of Withrow v. Larkin, __U.S.__, 43 U.S.L.W. 4459 (April 16, 1975) which indicates that the March 18 judgment of the District Court was in error.

DEFENDANTS' EXPOSITION OF THE FACTS

Hearing Delays

Defendants' factual statement (Defendant-appellees' Brief pp. 2-29)[1] is noteworthy more for the facts it omits than for those it includes. For example, defendants devote a substantial portion of their statement of facts to discussions respecting the delays in the administrative

1. Hereinafter citation to the Defendant-Appelees' Brief shall contain the letters "D.B." with the appropriate pagination. Reference to Plaintiff-appellants' Brief shall contain the letters "P.B.".

hearing process which is under constitutional challenge. (D.B. 8,11,12,28,29). What defendants fail to divulge are the delays attributable to the defendant Board. Thus, a hearing scheduled for October 30, 1974 was cancelled at the insistance of the defendant Board because of its attorney's prior commitment to appear in Rockland County Supreme Court. In December, 1974 the defendant Board cancelled a hearing because defendant Roher was unable to attend. A hearing scheduled on January 24, 1975 was also cancelled because of the Board's failure to secure a situs for the proceedings. (Affidavit of Sanford Katz sworn to February 20, 1975).

Thereafter, of course, the Board failed and continues to fail to hold hearings because it has declined to prosecute the charges. Accordingly, in light of defendants' cancellation of several hearing dates ultimately resulting in no hearings whatsoever for three and one half months, defendants' attempt to blame plaintiff or anyone other than itself for the absence of any proceedings is simply preposterous.[2]

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2. It should be noted that the reason plaintiff's counsel, Mr. Katz, requested an abbreviated administrative hearing schedule in January 1975 as mentioned at page 16 of defendants' Brief, was his participation as defense counsel in United States v. Coraluzzo in the United States District Court, for the Southern District of New York before Judge Robert Carter. That trial commenced January 6, 1975 and did not conclude until January 30. Defendants' reference to the abbreviated hearing schedule is regretable for its failure to disclose the pertinent facts.

Other Proceedings

Defendants also allocate substantial space in their factual statement to a description of various other proceedings before the Chancellor, the Board of Education, the Commissioner of Education, the New York State Supreme Court, and the Human Rights Commission. (D.B. at 2-8, 29). None of these proceedings deal in any way with plaintiff's constitutional rights or even contractual rights. Indeed, the Chancellor and Commissioner in ruling on the claims of certain Board members regarding the legality of the notice to the public of the August 8th meeting, specifically stated that they were not ruling on any of plaintiff's rights. Any implication that any tribunal other than the District Court ruled on these rights is entirely inaccurate.[3]

The April 3 Order

That Judge Stewart considered the order of April 3, 1975 necessary, is indicative of the inadequacy of the process which he unsuccessfully attempted to salvage. Defendants' assertion that the April 3 Order was a granting of plaintiff's motion pursuant to footnote 18 of the March

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3. As to the restraining order issued by Judge Rosenberg in New York Supreme Court, his decision which preliminarily enforced the plaintiff's suspension was based solely on what he perceived was a denial of a motion for a preliminary injunction in the Court below. However, as Judge Stewart points out in footnote 6 of the March 18 Opinion, Judge Rosenberg's decision was based on a misconstruction of the proceedings in federal court.

18 Opinion is erroneous and ignores the plaintiff's posture before the District Court regarding the defendants' failure to offer an administrative process. Plaintiff repeatedly argued to Judge Stewart as he now argues in this Court, that the appropriate relief when a court is faced with an unwilling prosecutor, is to order the charges dropped and plaintiff reinstated. It is not within the province of a court to become part of the prosecution team by, in effect, voting to prosecute charges. Accordingly, apart from the serious question regarding the District Court's jurisdiction to issue the April 3 Order without resurrecting the complaint and finding a violation of law, (See April 3, 1975 Order nunc pro tunc) the Order in no way grants the relief requested by plaintiff.

ARGUMENT

POINT I

UNDER WITHROW V. LARKIN PLAINTIFF HAS DEMONSTRATED UNLAWFUL BIAS AND PREJUDGMENT

Withrow v. Larkin, supra, involved a Wisconsin statute which proscribed certain conduct by physicians. The statute authorized an examining board composed of practicing physicians to warn, reprimand, or temporarily to suspend the license to practice of a doctor and to institute a criminal action or an action to revoke the license by referring the matter to the district attorney.

Plaintiff, a physician, was performing abortions in Wisconsin. The board notified him that it would hold an investigative hearing to determine whether he had engaged in certain proscribed conduct and, thereafter, upon a finding of probable cause, to determine whether to warn or reprimand plaintiff and whether to institute criminal or revocation proceedings.

After plaintiff's motion for a restraining order was denied, the board proceeded with its investigative hearing and found probable cause. Plaintiff was then advised that the board would hold a contested hearing to determine whether plaintiff had engaged in conduct which would warrant a temporary suspension of his license. Plaintiff successfully moved for a restraining order against the contested hearing. The District Court reasoned that because the board had moved from purely investigative proceedings to a hearing designed to determine whether plaintiff's license should be suspended,

a substantial federal question had arisen; namely, whether the authority given to the Board to investigate and present charges and to rule on these charges and impose punishment violated plaintiff's due process rights. Ultimately, the District Court concluded that plaintiff would suffer irreparable harm if the statute were applied to him and that his challenge to the statute's constitutionally had a high likelihood of success.[4]

The Supreme Court reversed holding that in the absence of other facts, the combining of the roles of adjudicator and investigator does not per se violate due process. In its opinion, the Court identified two standards for ascertaining unlawful bias and prejudgment which would disqualify an adjudicator:

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill, 411 U.S. 564 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law

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4. The issuance of a preliminary injunction before Dr. Larkin was in any way punished disposes of defendants' argument based on prematurity and the absence of irreparable injury. (D.B. at 30-35 37-41). As the Court found in Gibson v. Berryhill, 411 U.S. 564 (1973), once the administrative process is found defective, injunctive relief follows. The Court in Withrow at 4462 n.8 similarly states:

> Finally, we do not agree with appellants' contention that the District Court should have refrained from deciding the merits of this case and from interfering with the state administrative proceeding.

As in those cases, the question here turns on whether the District Court's opinion as to the constitutionality of the process is correct.

> has always endeavored to prevent even the probability of unfairness." Murchison, supra; cf. Tumey v. Ohio, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him. The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appriasal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Id. at 446 (footnotes omitted)

Under either test plaintiff's due process right to an impartial tribunal is violated.

A reivew of the charges and the Resolution pursuant to which they were brought manifests beyond cavil that the principal defendants, themselves, allege that they have "been the target of personal abuse or criticism from the party before [them]." The August 8 Resolution, drafted by the principal defendants, (T.373), clearly shows that, from their perspective, they are the victims of plaintiff's purported conduct:

> In his dealings with members of the Community School Board, Mr. Fuentes has exhibited antagonism, disrespect and truculence. He has openly flaunted his hostility toward and disregard of the lawful directions of, the duly elected Board, thereby contributing to the disruption of the educational processes in the District. He has publically called for opposition to the lawful decisions, actions and directions of the School Board and has served as a rallying point and focus for the small minority which has interfered with the Board in the exercise of its duties and its authority.
>
> (Pl. Ex. 18)

There can be no doubt that the principal defendants are "personally embroiled" in the issues which they seek to judge.

The charges which defendants have preferred against plaintiff, on their face, show that defendants have been the alleged victims of plaintiff's purported conduct. Defendants have charged plaintiff with, inter alia: calling defendant Roher a "liar"; with being insolent and insubordinate by declaring to defendant Roher, "I am through dealing with you as a human being", and by stating that he would no longer take verbal directions on School District matters from defendant Roher; threatening the defendants with violence and danger if they did not make "wise" decisions.

The embroilment of defendant Price is also evidenced by his $4,000,000 counterclaim against the plaintiff. The counter-

claim alleges the plaintiff was responsible for defendant's loss of his elected position to the Board as a result of the decision Coalition for Education in District One v. Board of Elections, City of New York, 320 F.Supp. 42 (S.D.N.Y.), aff'd. 495 F.2d 1090 (2nd Cir. 1974). Defendant Price seeks $3,000,000 from plaintiff although the latter was not even a party to Coalition. His personal animus towards plaintiff is further demonstrated by the Fourth counterclaim for defamation which accuses plaintiff of falsely and maliciously defaming him. The Supreme Court in Gibson v. Berryhill, supra at 578 (1973) suggested that a lawsuit by the Alabama Board of Optometry against plaintiffs could be considered a grounds for disqualifying the Board.

These facts present circumstances similar to those in Taylor v. Hayes, __U.S.__ 41 L.Ed. 2d 897 (1974);[5] Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Pickering v. Board of Education, 391 U.S. 563, 578-579, n.2 (1968), cited in Withrow

5. In Taylor, at 909, the Court stated that the trial judge before whom the alleged contemptuous conduct occurred, would have to recuse himself even though the alleged conduct did not constitute a personal attack on the trial judge. The Court held:

> But contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot "hold the balance nice, clear and true..." "Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties" but due process of law requires no less. Id. (Emphasis added) (citations omitted)

as examples of where adjudicators must be deemed bias without a showing of actual bias.

Even the "much more difficult burden of persuasion" is satisfied in this case since plaintiff has shown with uncontroverted facts that defendants Roher and Price are unlawfully biased and have prejudged the charges. Unlike the facts in Withrow, the instant case does not involve the "bald proposition...that agency members who participate in an investigation are disqualified from adjudicating." Here, defendants Roher and Price not only investigated certain charges, and were familiar with the underlying facts, they were personally embroiled with virtually all of the charges, testified as to their truth, and, defendant Roher testified in support of the charges at the administrative hearing, and will ultimately weigh the truth and probative value of his own testimony. The facts establish the clearest case of actual bias and prejudgment.

Unlike Withrow, in which an administrative body with no personal contact with Dr. Larkin reviewed facts presented to it exclusively in an official context, the principal defendants have asked to review facts of which they became aware as well as involved in capacities other than as adjudicators or even investigators. Indeed, the three charges which on their face offend the First Amendment involve facts of which the principal defendants became aware during a political election before they became Board members. (See P.B. at 12-13). The absence of personal involvement and unofficial personal knowledge of the facts were crucial to the holding in Withrow and the bases upon which the Court distinguished the facts of In re Murchison, 349 U.S. 133 (1955). Withrow v. Larkin, supra, at 4465. The adjudicators' "initial view of the facts" in this case is sufficiently strong to enable defendant Roher to commit his view to sworn testimony as the principal witness called by the Board at the administrative hearing. The substantial record regarding prejudgment in this case is the type the Court contemplated as foreclosing "fair and effective consideration" of the facts sufficient to raise a substantial due process question. Id. at 4466. Simply put, plaintiff has produced the strongest evidence on the issue of bias and prejudgment - the charges, the August 8 Resolution and defendants Roher and Price's own testimony as to the truth of the charges.

In sum, unlawful bias and prejudgment is not established by the application of mechanical formulae. Withrow v. Larkin, supra, requires a court to determine the nature of the relationship between the adjudicator and the

accused; the nature of the charges and the adjudicator's involvement with them; and, the extent to which an adjudicator has taken a position with respect to the issues before him. These facts are not in dispute in this case. They establish that the principal defendants are substantially embroiled in the dispute, have alleged that they are the target of plaintiff's purported hostility, disrespect and political activity which form the basis of the charges, and that one defendant's specific views as to the truth of the charges are sealed under oath.

The Rule of Necessity Does Not Restrict Due Process Rights

Defendants further argue that to disqualify employers because of bias and prejudgment from hearing charges of misbehavior of their employees would be a convenient "bootstrap" for misbehaving employees.[6] Defendants cited Beattie v. Roberts, 436 F.2d 747 (1st Cir. 1971) in support of this proposition. However, the facts in Beattie were essentially the same as in Withrow. The claim only involved the multiplicity of functions of a school board which has made the initial determination not to renew a teacher's contract and was also the adjudicator at the plenary hearing. There was no allegation that the Board members had actual bias or prejudgment other than as a result of their official investigating functions. Nor, more importantly, was there any allegation that Board members had been personally embroiled with and were the targets of personal abuse by the plaintiff.

6. It is clear that this is not a case of bootstrapping. Defendants have never suggested that embroilment between the parties was the result of an attempt by plaintiff to disqualify certain of them from hearing charges against him.

Simard v. Board of Education of Town of Groton, 473 F. 2d 988 (2nd Cir. 1973) similarly presented facts akin to Withrow: none of the school board members was embroiled in the issues as, for example, defendant Roher. Moreover, as stated above, unlike Simard, plaintiff does not seek to disqualify the Board in toto, but only the two members whose personal embroilment, bias and prejudgment are beyond dispute. (See P.B. at 37 n.19).

Defendants also rely on several New York State decisions which set forth the administrative "rule of necessity." However, that rule applies only when there is no due process right to a hearing. The Court of Appeals in Sharkey v. Thurston, 268 N.Y. 123 (1935), a case upon which defendants principally rely, most emphatically makes that point:

> It is a fundamental rule of our common law, embodied in the Constitution of our State and Nation, that no person may be adjudged guilty and punished upon a charge of wrongful conduct without a hearing. Decision must await the hearing of the defense. The cause may not be prejudged, and no man may be both accuser and judge. Otherwise a hearing becomes a fiction, and no fiction can destroy constitutional guaranties.
>
> It is said that necessity, at times, dictates a relaxation of the rule. (Matter of Ryers, 72 N.Y. 1; People ex rel. Hayes v. Waldo, 212 N.Y. 156) That is not entirely accurate. Necessity, whether actual or assumed, can never be a valid ground for depriving any person of a right guaranteed by the Constitution or impose upon any person the consequences of guilt upon which a fair hearing has not been accorded.
>
> Examination of the cases where argument of necessity, based upon the common welfare, has been given weight, show that they are confined to a narrow field. The right to a hearing before a judge who has not determined the issue in advance has in no case been denied on such ground where determination of guilt may result in the deprivation of liberty or property...Id. 126, 127

The Court went on to determine that the plaintiff there had not been deprived of liberty or property and, therefore, had no due process rights. Similarly, the other cases cited by defendants which apply the "rule of necessity" do not find a due process right to a hearing.[7]

7. See, Matter of Reed v. Richardson, 26 Misc. 2d 89, at 93, 94 (Sup. Ct., Onondaga Co. 1960); Komyathy v. Board of Educ. of Wappinger Central School Districtl. 1, 75 Misc. 2d 859 at 863 (Sup. Ct., Dutchess Co. 1973). See also Matter of Widger v. Board of Education of Central School District, 1, 35 Misc. 2d 529, 530 (Sup. Ct. Cattaraugus Co. 1962) which held that there was only a common law right to a hearing which could be modified by statute. Defendants also cite Matter of Kaney v. New York State Civil Service Commission, 190 Misc. 944, 947-948 (Sup. Ct., Erie Co. 1948), aff'd 273 App. Div. 1054, aff'd 298 N.Y. 707; where the court in dicta stated the "rule of necessity". But, it was clear that plaintiffs had no constitutional rights to a hearing since they had no property interests in the existence of a civil service eligibility list, and their right to a hearing attached only after appointment. Id. at 950. Similarly Matter of Yorke v. Board of Education of Union Free School District 20, 61 Misc. 2d 794 (Sup. Ct. Nassau Co. 1969) is inapposite since there was no decision on the "rule of necessity", only the dicta quoted by defendants.

Finally, to the extent that the decision of the New York State Commissioner of Education in In the Matter of the Appeal of Abramowitz, 14 Ed. Dept. Rep ____ is inconsistent with due process and Sharkey v. Thurston, supra, it is incorrect.

The entitlement of plaintiff to a due process hearing with impartial adjudicators is clear because of the property and liberty rights at stake. Board of Regents, v. Roth, 408 U.S. 564 (1972), Perry v. Sindermann, 408 U.S. 593 (1972). Plaintiffs' rights to continued employment under his contract and his liberty rights to be free from charges tainted by First Amendment violations which impugn his reputation give rise to due process protection, and thus, the "rule of necessity" is inapplicable. Sharkey v. Thurston, supra.

The "rule of necessity" also is inapplicable under its own terms since it applies only when there are no persons who are qualified (e.g. not biased) to hear the charges.

> ...it has been held that the rule of necessity applies to sole tribunals but not to an agency consisting of several board members where a majority may act if tainted members are disqualified. (People ex rel. Pond v. Board of Trustees of Vil. of Saratoga Springs, 4 App. Div. 399; Ann. 39 A.L.R. 1476, 1479-1482, Officer--Disqualification--Necessity).

In Komyathy v. Board of Education at 867, the court disqualified one of the defendant school board members because it appeared he harbored a certain animus towards the plaintiff as a result of one of the charges. The court found that remaining members formed a sufficient quorum to rule on the charges. Similarly, in the instant case, defendants Roher and Price, who have testified about their own prejudgment, could be disqualified without affecting the ability of the remainder of the Board to rule on charges since a quorum would continue to exist. Thus, under the facts of this case the "rule of necessity" does not become operative.

Finally, to apply the "rule of necessity" as defendants contend, would be at odds with the findings of the majority of the Justices in Arnett v. Kennedy, 416 U.S. 134 (1974).[8] The rule amounts to the application of a statute to limit due process rights. Simply stated, the rule provides that: where a right to a hearing is derived from a statute, and that statute assigned the adjudicative duty to a certain public officer, that officer cannot be disqualified for any reason including prejudgment and bias. The concurring judges in Arnett took issue with the plurality opinion which held that the statute which gives rise to a property interest could also limit the procedural benefits derived from that interest. Id. 40 L.Ed. 2d at 40. Justices Powell, Blackmum and White found that once the rights of procedural due process attach as a result of a property interest they could not be limited by statute. As Justice White notes, the three dissenting Justices Marshall, Douglas and Brennan also reach the same result. Id. 40 L.Ed. 2d at 66. The "rule of necessity" is conditioned on a statutory limitation on the due process rights of a party and must fall under the reasoning of the six Justices in Arnett. It is perhaps for this reason, that the Court in Gibson v. Berryhill, supra had no difficulty in affirming an injunction against the Alabama Board of Optometry on the basis of bias and prejudgment where it was evident that the Board was the only body which could hear the charges against plaintiff.

8. For a more detailed discussion of Arnett, see pp. 17-20 infra.

POINT II

DEFENDANTS MISCONSTRUE ARNETT v. KENNEDY

Plaintiff argued in his initial brief that nothing in his contract limits his due process right to an impartial tribunal. (P.B. at 44). Defendants maintain, without a single reference to a contract or statutory provision, that plaintiff somehow relinquished his due process right to impartial adjudicators. The absence of any such reference is the clearest indication that defendants' waiver argument is without factual support.[9]

However, the twisted logic on which defendants' attempt to justify their deprivation of plaintiff's constitutional guarantees, is compounded by their misreading of Arnett v. Kennedy, supra. Thus, they rely heavily on the Arnett case for the proposition that a contract or statute which creates a property right can limit the procedures which are afforded under the due process clause when the property right is jeopardized. As discussed above, that interpretation accurately reflects the opinions of three Justices--Justice Rehnquist, Berger and Stewart--it

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9. It should be noted that Judge Stewart did not find a waiver of plaintiff's right to impartial adjudicators.

is contrary to the opinions of the remaining six Justices, who maintain that a statute or contract creating a property right cannot limit the process which is due under the Fourteenth Amendment.

In addition to Justices Douglas, Marshall and Brennan who dissented with respect to all aspects of the plurality opinion, Mr. Justice White dissented from the view that where the grant of a substantive right is enmeshed with the limitations on the procedures, a litigant must take the "bitter and the sweet".

> I differ basically with the Court's view that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet," and that "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." Ante, p. __, 40 L.Ed. 2d __. The rationale of this position quickly leads to the conclusion that even though the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pre- or post- termination. Id. at __, 40 L.Ed. 2d 15, 46.

Similarly, Mr. Justices Powell and Blackmun rejected the "bitter and the sweet" principle:

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in Roth and Sindermann. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily-created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. Id. at 40 L.Ed. 2d 40-41.

Accordingly, contrary to defendants' analysis of Arnett, a six Justice majority in that case held that even if plaintiff's contract somehow could be construed to implicitly wrest from him his due process right to impartial judges, that construction

would be contrary to the Fourteenth Amendment.[10] As Justice White observed:

> While the State may defi[illegible] t is and what is not property [illegible] having defined these rights the [illegible]citution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition.
>
> Id. 40 L.Ed. 2d at 51

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10. It should be noted that when faced with a statute silent on impartiality, Mr. Justice White reasoned:

> We n[illegible] not hold that the Lloyd-LaFollette Act i[illegible]nconstitutional for its lack of provision of an impartial hearing examiner. Congress is silent on the matter. We would rather assume that because of the constitutional problems in not so providing that, if faced with the question, at least on the facts of this case, Congress would have so provided. Volkswagenwerk v. FMC, 390 U.S. 261, 272, 19 L.Ed. 2d 1090, 88 S.Ct. 929 (1968). "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." Greene v. McElroy, supra. 360 U.S., at 507 (citations omitted) 3 L.Ed. 2d 1377. Id. at 40 L.Ed. 2d 59.

POINT III

THE FIRST AMENDMENT ISSUE IS RIPE FOR REVIEW

Defendants erroneously assert that even though plaintiff has been charged and suspended on the basis of charges which violate his First Amendment rights, he must await dismissal for the issue to become ripe. (D.B. at 41). Arnett v. Kennedy, supra, upon which defendants rely for support does not rule on nor does it even address the issue of ripeness.

The ripeness doctrine stems from Article III of the Constitution which forbids federal courts from rendering advisory opinions, and restricting them to issues raising a case or controversy. Clearly, a suspension based on unconstitutional charges is sufficiently concrete and immediate to raise a case or controversy.

The chilling effect resulting from actions which restrict speech, assemblage, and association is sufficient to trigger a case or controversy, even before concrete punative action such as a suspension is taken. In Steffel v. Thompson, 415 U.S. 452 (1974), the mere threat of an arrest was sufficient to permit a constitutional challenge to the application of an anti-trespass statute. The Supreme Court held that it was unnecessary for Mr. Steffel to expose himself to actual arrest or prosecution to raise his constitutional challenge.

As far back as United Public Works v. Mitchell, 330 U.S. 75 (1946) in which the issue of ripeness was considered in the context of the Hatch Act, the Court, although ruling that persons who had not yet committed the proscribed conduct did not present a ripe issue, determined that one litigant, Mr. Poole, who had only been charged with committing proscribed acts presented a ripe issue for review. Since Mitchell, supra courts have taken a liberal view of the presence of the case or controversy rubric when First Amendment rights are affected; thus, they have expanded the concept of "actual interference" when First Amendment rights are at stake. See Steffel v. Thompson, supra.

In Wolff v. Selective Service Local Board, No. 16, 372 F.2d 817 (2nd Cir. 1967), this Court ruled that the reclassification of a student's draft status on the basis of his participation in a demonstration presented a sufficient case or controversy to require review. This Court held on the justiciability issue:

> Here it is not relevant whether or not appellants will ever be inducted. The effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights, for there can be no doubt that the threat of receiving a I-A classification upon voicing dissent from our national policies has an immediate impact on the behavior of appellants and others similarly situated.
>
> It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly and

the right to vote. Id. 823-824.

In National Student Association v. Hershey, 412 F.2d 1103, 1115 (D.C. Cir. 1969), the policy of the Selective Service Director respecting deferments was challenged under the First Amendment. The Court said, (per Bazelon, Ch. J.):

> It matters little whether his directive is a "rule", and "order", a set of instructions or only a sui generis "directive". Whatever it is in law, it purports to be an authoritative declaration of policy....Thus, it may deter not merely validly proscribed conduct, but any protest activity which a registrant could plausibly expect his draft board to think unprotected or illegal.

The individual litigants were not even liable to be drafted. The Court ruled nonetheless:

> [A] plaintiff need not inevitably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." Id. at 1110

Here, plaintiff has been subjected to Board action on the basis of charges which condemn his political expression and association. His suspension goes far beyond the facts in even the Mitchell case. Clearly, a justiciable controversy exists.

POINT IV

PLAINTIFF'S DUE PROCESS CLAIMS ARE RIPE FOR REVIEW

As demonstrated above, defendants' prematurity argument evaporates under Winthrow v. Larkin, supra and Gibson v. Berryhill, supra. None of defendants' cases contain facts wherein a procedural due process challenge is made upon grounds identical to the grounds upon which a plaintiff claims he need not exhaust an administrative remedy. Since plaintiff's exhaustion argument is, in part, based on the presence of unlawful bias, and since the exhaustion issue cannot be postponed (Gibson at 575), a disposition of the question of exhaustion is, in effect, a disposition of the due process issue. Virtually all of defendants' cases are limited to challenges to the constitutionality of charges (e.g. Stevenson v. Board of Education, 426 F.2d 1154 (5th Cir. 1970)(involving a school dress code), or the legality of certain regulations (e.g. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)) and not the composition of a tribunal as in Withrow, Gibson or the instant case.

None of defendants' cases present the problems which arise when there is an overlapping of the exhaustion question and a procedural due process question, where a decision on the former question is also dispositive of the latter question. None of defendants' cases are contrary

to the teachings of Gibson that once bias is determined for purposes of exhaustion, a district court must forge necessary relief to remedy a due process violation.

Thus, Abbott Laboratories, supra is inapposite. That case in no way involved the manner in which administrative charges were disposed of and whether charges would be heard in a manner consistent with due process. There, plaintiffs challenged certain regulations claiming they were not authorized by statute. An injunction was sought prior to the enforcement of these regulations, and the question presented was whether pre-enforcement judicial review was appropriate - not whether a tribunal may proceed to hear charges once bias, and prejudgment have been found.[11] Although Abbott is irrelevant to the instant case, it is interesting to note that the Court held that a pre-enforcement judicial determination was appropriate.

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11. This Court should note that the instant lawsuit is substantially different from Sampson v. Murray, 415 U.S. 61 (1974) for the same reasons. While this case presents an overlapping of the due process and exhaustion questions identical to Gibson, Sampson did not. Moreover, the issue in Sampson did not even go to the question of whether the administrative agency could serve as an adjudicative body consistent with due process in light of the presence of bias on the part of certain persons. As in Abbott, the issue was limited to the application of certain regulations, and did not relate to the makeup of the tribunal determining the application of the regulations. As the Court recognized in Gibson, a constitutional challenge directed to the composition of a tribunal which overlaps with the exhaustion issue must be disposed of together before the process in question has run its course.

The Court ruled that the question was purely legal and its resolution did not require administrative expertise. Id. at 151. The Court further reasoned that to withhold judicial review would constitute a hardship on the plaintiffs. As was pointed out earlier, the due process and exhaustion issues before this Court, not only must be adjudicated without delay pursuant to Supreme Court mandate, but, in addition, in no way involve administrative expertise by the School Board. The issues of exhaustion and due process fall squarely within the expertise of the federal courts.

Stevenson v. Board of Education, supra is also irrelevant. No issue was raised in that case respecting the fairness and adequacy of the administrative hearing. The Court, in fact, heard the case prior to any administrative hearing. The court did state that prior to seeking federal relief, the plaintiffs should have been required to appear before the administrative body to insure that the matter at issue is final within the institution--there, the school board's view of students' suspension. Here, the defendant Board's refusal to disqualify defendants Roher and Price is final from the Board's point of view, and, accordingly, plaintiff's claims as to bias and prejudgment are ripe for review. Moreover, in Stevenson no claim was made that the administrative body was unconstitutionally composed or contained some other constitutional defect precluding a due process hearing.

Indeed, once it was determined through testimony that members of the administrative body in Stevenson would have sustained the plaintiffs' suspension, the Court found that it was unnecessary to refer the case back to the agency and proceeded to dispose of the constitutionality of the charges. In any event, since Stevenson does not involve a constitutional attack on the composition of the administrative body to be exhausted, it adds nothing to the present issue.

The vintage of Reinicke v. Loper, 77 F. Supp. 33 (D. Hawaii 1948) is more instructive than the opinion since it predates McNeese v. Board of Education, 373 U.S. 668 (1963) when the section 1983 exception to the exhaustion requirement was first announced by the Supreme Court. Moreover, Reinicke concerned an attack on the substance of the charges - communist affiliation - and not on the composition of the administrative body as in the instant litigation. Thus, when the Court held that the suit was "premature" since the Commissioners had not yet heard the charges, it was not confronted with the question, as is this Court, of whether the Commissioners themselves, are able to hear the charges consistent with due process. Finally, it is safe to state that in light of McNeese, Damico v. California, 389 U.S. 416 (1967); Houghton v. Shafer, 392 U.S. 669 (1972); Carrer v. Stanton, 405 U.S.

669 (1972) and Gibson v. Berryhill, supra, Reinicke does not represent current authoritative precedent regarding the exhaustion doctrine.

Beattie v. Roberts, supra, whatever its value to the issue before this Court, is, in the very words of the First Circuit, contrary to the law in the Second Circuit. Id. at 751, n.

POINT V

THE CLEARLY ERRONEOUS
STANDARD IS INAPPLICABLE

Defendants argue that the decision below cannot be reversed unless there is a showing that the decision was "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure. This standard is inapplicable in the instant case since all the material facts are undisputed, and all that is at issue are erroneous conclusions based on misapplications of law. This Court is obviously not bound by the lower court's conclusions of law nor must it apply the "clearly erroneous" standard to those findings. United States v. General Motors Corp., 384 U.S. 127, 141 (1966).

The undisputed, largely documentary facts show that the charges on their face manifest that certain Board members were the target of plaintiff's purported hostility, disreprect and threats; that the August 8th Resolution stated that the Board members were the targets of plaintiff's alleged "antagonism, disrespect and truculence" and "hostility". Defendants' own testimony clearly establishes that defendants Roher and Price believe the charges to be true; and, that defendant Roher has testified as to the truth of the charges at the administrative hearing. These uncontested facts of embroilment and prejudgment when considered under the legal standards of Withrow require the conclusion that plaintiff's due process right has been violated. The lower court failed to reach that conclusion by

a misapplication of legal standards, resulting in an erroneous conclusion to which this Court is not bound.

Except for the instance where an adjudicator, himself, states the conclusion that he is biased and has prejudged the issues, a finding of bias is the result of applying the legal standards, which set forth the elements of bias, to the evidence before the Court. Justice Frankfurter in Baumgartner v. United States of America, 322 U.S. 665, 670-671 (1943) elaborates on this point:

> The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact", it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the

> whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court.

The facts or the elements of bias and prejudgment which would disqualify an adjudicator, were enunciated by the Supreme Court in Withrow as those facts showing that: (i) the adjudicator has a pecuniary interest in the outcome or; (ii) the adjudicator has been the target of personal abuse or criticism from the party before him. Id. at 4463.

This element of bias, that defendants had been the "target of personal abuse or criticism", was demonstrated by the documentary evidence presented to the lower Court: the charges which defendants preferred against plaintiff and the August 8th Resolution. These were further substantiated by the defendants' own testimony of prejudgment. The District Court's failure to reach the finding of bias when faced with the documentary evidence, alone, was an error of law and a misapplication of the standards of bias and, therefore, not subject to the "clearly erroneous" standard of Rule 52(a).

The consideration of ultimate findings or conclusions (i.e. bias) where the finding is based on the application of some legal formula to evidentiary facts has traditionally been considered outside of the scope of Rule 52(a). See e.g. United States v. General Motors Corp., supra, whether there is a "combination or conspiracy" under §1 of the Sherman Act; Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 306-307 (2nd Cir. 1963)(per Kaufman, J.) whether there is a "sufficient relationship" between a store and its licensee in the store who is selling bootleg

records to create joint liability for copyright infringement; Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 777-778 (2nd Cir.) cert. denied 385 U.S. 835 (1966)(Friendly, J.), whether certain actions are "negligent"; Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc., 375 F.2d 639 641 (2nd Cir. 1967), cert. denied 389 U.S. 1036 (1968)(Hays, J.), whether there is an "employee-employer" relationship for the purposes of the Copyright Act. Duquesne Club v. Bell, 127 F.2d 363, 364 (3rd Cir. 1942) cert. denied 317 U.S. 638 (1942), whether a club is a "social club" under Internal Revenue Code; United States v. Richberg, 398 F.2d 523, 526, (5th Cir. 1968) whether a restaurant is a "club" under the 1964 Civil Rights Act. In all these cases the courts rejected the "clearly erroneous" standard. After looking to the underlying facts as developed in the trial court, all reached contrary conclusions or ultimate findings based on the proper application of appropriate legal standards.

This circuit, per Judge Friendly, recently addressed itself at some length to these very issues:

> Whether application of a legal standard to facts that are undisputed or have been found without clear error is a question of law or of fact is, as we said in Ellerman Lines, Ltd. v. The S.S. President Harding, 288 F.2d 288, 292 (2nd Cir. 1961), "[a]n area over which 'law' and 'fact' have battled for a century," See also N L R B v. Marcus Trucking Co., 286 F.2d 583, 590 (2nd Cir. 1961). Perhaps clarity of thought would be promoted by recognizing that it is not exactly one or the other. Jural concepts are not limited to binary systems. The scope of review might be better understood by recognizing that the imperatives of F.R. Civ. P. 52(a) and its analogues

> are avoided whenever the issue is not one of "fact"; there is no necessity for going further and endeavoring to establish that it is one of "law" in the usual meaning of that term. Once this is understood, appellate courts can formulate such standards of review, subject, of course, to governing legislation, as comport with good sense and institutional allocations of power. .... To be sure, an appellate court must respect findings of the trial judge as to what in fact happened and in addition should give due weight to his superior opportunity to acquire the true feel of the case, cf. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 216, 67 S.Ct. 752, 91 L.Ed. 849 (1947). But when the issue is his application of a legal standard to facts undisputed or reasonably found, reversal is not limited to results that are "clearly erroneous"; it is enough that the appellate court should be convinced, as we are here, that the result does not jibe with the applicable rule of law.
>
> In re Hygrade Envelope Corp., 366 F.2d 584, 588 (2nd Cir. 1966)

The finding of bias and prejudgment whether characterized as "fact" as defendants suggest, or as "law" is simply a word game - the crux of the issue is that the finding involves the application of a legal standard and, as such, is subject to reversal without recourse to the limitations of the "clearly erroneous" standard.

Defendants' reliance on Coalition for Education in District One v. Board of Education City of New York, supra is to no avail.[12] There, this Court correctly found that factual inferences from undisputed facts were covered by Rule 52(a). The trial court drew factual inferences that neutral acts had

12. The other cases relied on by defendants present disputes as to underlying facts. They are, accordingly, inapposite.

a discriminatory impact. That inferential process did not involve the application of any legal standard. In the instant case, there are no inferences to be drawn from the charges or the August 8th Resolution which, on their face, establish embroilment which, without more, gives rise to a finding of bias and prejudgment. Moreover, there are no inferences to be drawn from the testimony of defendants Roher and Price that they have formed opinions as to the truth of the charges. Nor are there inferences to be drawn from Roher's administrative testimony as to the truth of specific charges.

The District Court's reliance on the credibility of defendants' disavowals of unalterable prejudgment and bias, is also not binding on this Court. The question of whether or not bias and prejudgment exist under Withrow turns on the demonstration of whether the adjudicators are the targets of plaintiff's alleged abuses. These underlying facts are demonstrated on the face of the charges and the August 8th Resolution, thus automatically triggering a finding of bias and prejudgment. This Court is not bound by the lower court's finding of credible disavowals since those findings are irrelevant to the determination of bias. The rule acts to bar even adjudicators who are not actually biased and who would do their best to weigh the scales of justice equally. Disavowals of bias and prejudgment under Withrow are not even an ingredient to be considered when adjudicators are targets of abuse. Taylor v. Hayes, supra.

Finally, even accepting arguendo that Rule 52(a) applies, the finding of no bias and prejudgment is clearly erroneous. The documentary evidence of the charges themselves

as well as the August 8th Resolution, the testimony of defendants Roher and Price that they believed the charges to be true, and the testimony of defendant Roher at the administrative hearing compel a finding of bias and prejudgment under the standards enumerated by Withrow. In light of this overwhelming proof, any factual finding by the Court below that defendants are not biased is clear error:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.
>
> United States v. United States Gypsum Co., 333 U.S. 364, 395 (1947)

CONCLUSION

For the reasons stated herein, plaintiff respectfully urges this Court to reverse the judgment of the District Court.

Dated: New York, New York
May 12, 1975

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I, HERBERT TEITELBAUM, an attorney for plaintiff-appellant, hereby certify that one copies of the attached Appellant's Reply Brief were mailed to each of the following parties, by placing said copies in envelopes which were then properly stamped and addressed and deposited in a U.S. mail box this 12th day of May, 1975.

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Service of a copy of the
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